THE FORFEITURE AND CONFISCATION OF REBEL PROPERTY IN THE CONFEDERATE STATES.

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OF

HON. EDGAR COWAN,

OF PENNSYLVANIA,

IN THE SENATE OF THE UNITED STATES,

Tuesday, March 4, 1862.

WASHINGTON, D. C.
SCAMMELL & CO., PRINTERS, CORNER OF SECOND AND INDIANA AVENUE, THIRD FLOOR
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The special order of the day, which was Senate bill No. 151, to confiscate the property and free the slaves of rebels, being before the Senate—

Mr. COWAN said:

Mr. PRESIDENT: I agree with the honorable Senator from California, and look upon the bill now under consideration as the most important, by far, upon our Calendar, involving the gravest questions and most momentous issues. If it passes, I think it will be the great historic event of the times—times which are as fruitful of events as any the world has ever witnessed. Upon the disposition we may make of it, perhaps the fate of the American Republic may depend; and no one surely can overrate the magnitude of anything which may be attended with such consequences.

We are standing now squarely face to face with questions of most pregnant significance. Shall we stand or fall by the Constitution, or shall we leave it and adventure ourselves upon the wide sea of revolution? Shall we attempt to liberate the slaves of the people of the rebellious States, or shall we leave them to regulate their domestic institutions the same as before the rebellion? Shall we go back to the doctrine of forfeitures which marked the middle ages, and introduced feuds which intervening centuries have not yet sufficed to quiet? These are great questions, and they are in this bill, every one of them.

If, for one moment, we can suppose the scheme consummated which it contemplates, we shall have the following results:

I suppose it is reasonable and moderate to estimate the number of people engaged in the rebellion to be equal to one-half of the whole white population of the Confederate States—say four millions. If so, this bill proposes, at a single stroke, to strip all this vast number of people of all their property, real, personal, and mixed, of every kind whatsoever, and reduce them at once to absolute poverty; and that, too, at a time when we are at war with them, when they have arms in their hands, with four hundred thousand of them in the field opposing us desperately.

Now, sir, it does seem to me that if there was anything in the world calculated to make that four millions of people and their four hundred thousand soldiers in the field now and forever hostile to us and our Government, it would be the promulgation of a law such as this. Will they yield to us sooner in view of such a result to them? What would we be likely to do if they were to threaten us with a similar law? Would we ever, under any circumstances, yield on terms like these? I need hardly ask that question to men descended from sires who refused to pay the tax on teas, and from grandsires who rose in rebellion and overturned a monarchy rather than pay twenty shillings ship money—for that, I believe, was the sum demanded from Hampden, and which cost Charles I his head.

Again: the forfeitures of William the Conqueror, decreed upon the property of the Saxons who followed Harold to the field of Hastings, sink into utter insignificance compared with those enacted in the bill before us. The proud Norman and his rapacious barons were content with the castles and fiefs of the Saxon leaders whom they had overcome, but they did not dare to strip the people, or, indeed, even much to increase their burdens. They knew,

victorious and all as they were, that would have involved them in a new and far more dangerous struggle, in which every peasant would have been a principal combatant, with his all at stake.

Neither did the English conquerors of Ireland, in their long series of forfeitures and confiscations, from the time of Strongbow down to the rebellion of 1798, ever, at any time, venture upon such a sweeping measure as this; their attainders exhausted themselves upon the Irish nobility, and they never were rash enough to strip the Irish people. I do not know the value of the property forfeited by this bill; I cannot even approximate it, except to say that it is enormous—to be computed by billions. But, sir, the bill goes further, and forfeits a vast amount of property of the rebels which, when forfeited, cannot be confiscated or put into the coffers of the conquerors—I mean their property in negro slaves.

Now, I do not mean to stop here to discuss their right to this species of property; it is enough for me to say that all the people of the slave States, loyal and rebellious, seem to agree as to this with a wonderful unanimity, and to resent with an excessive sensibility any interference with it whatever. And, although in the bitterness of the feuds engendered by the civil war now raging among them, the loyalists there would be glad to join in inflicting upon the rebels even the severest punishments, yet this one they abhor and refuse, because they aver that it would be equally injurious to them as to their enemies; and it makes no manner of difference whether that view is correct or not, if they believe it—and this their representatives can tell us. What I mean to say is, that this bill would liberate, perhaps, three millions of slaves; surely the most stupendous stroke for universal emancipation ever before attempted in the world; nay, I think it equivalent, if carried out, to a virtual liberation of the whole four millions of slaves in the Union.

But what is to be the effect of it upon the war? Will we be stronger after it than before; or will we find we have doubled the number of those in arms against us? They have now no cause of war; will not this measure furnish them one, and one they think more just and holy than any other? Let the loyal men who know them also answer this question. I will abide their answer, and submit again that no deliberative assembly in the world ever before sat in judgment upon an issue of such magnitude.

Not content, however, with this, those who favor this bill seem determined to bewilder and blind us still more by an additional project of greater magnificence, and, if possible, of greater difficulty; and that is, in the duty it imposes upon the President, in the third section, of procuring a home for these emancipated millions in some tropical country, and of transporting, colonizing, and settling them there, if they desire to go, with guarantees for their rights as freemen; and this is all provided for in a section of a single sentence of nine lines! Surely, sir, we must have been recently transported away from the sober domain of practical fact, and set down in the regions of eastern fiction, if we can for a moment entertain this proposition seriously. Do the advocates of the scheme propose to confer upon the President the gold-making touch of Midas? One would think the universal menstrum or the philosopher's stone had been at last discovered. Certainly, nothing short of the ring and lamp of Aladdin, with their attendant genii, would enable us in our present condition to assure the President of his ability to enter upon such a task, unless, indeed, it is conceived the Treasury note is of equal potency in this behalf. If so, the sovereign of the tropical country and the transportation companies ought to be consulted in regard to the legal-tender clause. I suppose it is not expected that the exodus can be supported on the way by quails and manna; and yet, I am free to say, it will need the miraculous interposition of Heaven quite as much as did that of the Israelites of old.

But to return: at a time when every energy of the country is put in requisition to suppress the rebellion; when we are in debt equal to our resources of payment, is it not strange that this scheme, which would involve us in a cost more heavy than even the present war, should be so coolly presented for our consideration, and urged to its final consummation with a kind of surprise that any one should oppose it? It is certainly due to ourselves, if not to the country, that we should not be in haste about engaging in such gigantic schemes.

Then there is a further consideration involved in this bill of still greater moment than even those I have already glanced at; and that is,

its direct conflict with the Constitution of the United States, requiring us, indeed, should we pass it, to set aside and ignore that instrument in all its most valuable and fundamental provisions; those which guaranty the life, liberty, and property of the citizen, and those which define the boundaries between the powers delegated to the several departments of the Government.

Pass this bill, sir, and all that is left of the Constitution is not worth much. Certainly it is not worth a terrible and destructive war, such as we now wage for it. And it must be remembered that that war is waged solely for the Constitution, and for the ends, aims, and purposes sanctioned by it, and for no others.

I am aware, however, that some think the Constitution is a restraint upon the free action of the nation in the conduct of the war, which they suppose could be carried on a great deal better without it, &c. Now, sir, I have no hesitation in saying that no greater mistake ever was made in the world than is made by such people. And I am afraid it amounts to an open confession that they have not examined very carefully the full scope of its provisions, because, under it, I think we have full and ample powers delegated to the General Government to enable it to do, in war as well as peace, everything which a Government ought to be allowed to do; while at the same time it has laid down accurately upon its charts all those rocks upon which other Governments have been split and wrecked heretofore, with the proper prohibitions to prevent us from seeking our destruction upon them. And I will venture to say that there is not a restraint it imposes which is not salutary, and which, if thrown off, will not prove most destructive. The real danger consists in the fact that the prohibited measures are all of them, at first sight, most plausible; they are not roaring breakers, obvious to all, but sunken rocks in a calm sea, where the chart of experience is most necessary to guide the political pilot, if he is prudent enough to take the warning.

I am, therefore, opposed to this bill, to all and every part of it, except to the last two sections, which, although not free from objections, yet these are not of such a serious character but that I could give my assent to them. I will proceed to give my reasons then, and show, if I can, why I think the bill and its main provisions unnecessary, impolitic, inexpedient, and unconstitutional, and, I might add, utterly and totally useless.

In doing this, I trust I shall also be able at the same time to show that the Government, notwithstanding, has the power, and can do all in a constitutional and lawful way which is necessary and proper to be done to put down the rebellion and to punish the rebels; that there is not in reality the slightest necessity to strain the provisions of the Constitution in anv way, but just to give them their free and natural play according to the original design of the framers of it. As, for instance, the President can and has a right to do a great many things against the rebels by means of the war he makes upon them, which it would be absurd to ask us to do against them through the medium of *law*, of which I shall say more hereafter. Now, however, I shall address myself to sustain this proposition, to wit: Congress cannot forfeit the property of rebels for longer than their lives, by the enactment of any law whatever, for the following reasons:

1. Those persons now in rebellion, having levied war against the United States, are guilty of treason within the exact definition of that crime contained in the third section of the third article of the Constitution, in which it is declared that—

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

Now, it cannot be doubted but that as soon as the rebels are arrested and brought within the power of any law we may pass, they become *eo instante* traitors, and obnoxious to the punishment which is imposed by our statute for treason. As long, however, as the rebel is at large, or in the hands of the military, he cares nothing for the law, and is not amenable to it, because the military power cannot try him under the law—that must be done by the courts. But the second clause of that same section provides further, that—

"The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Therefore any law made for the guidance of the courts must conform to this provision, and no other or greater penalty could be imposed

than it would warrant. If, therefore, the law was to enact an absolute forfeiture of the estates of the traitor, it would be bad for the excess, and the judges would be obliged to make the sentence constitutional, either by cutting down the statutory penalty to a forfeiture of his estates for life, or by omitting to forfeit them at all. All this seems to me so obvious as not to be doubted.

2. The power assumed in this bill is also obnoxious to the provisions of the Constitution, if it be assumed that Congress can legislate an effectual forfeiture of the estates of rebels, as such, without allowing them an opportunity or means of trial in the courts. Because,

1. By the fifth amendment to the Constitution, it is provided:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Here it is attempted to deprive a large class of persons of all their estates and property, without any arrest, without any presentment by a grand jury, without any trial by a petit jury, without, indeed, any trial at all in any court. This would be to deprive them of their property in the very face of the provision requiring that it shall only be done "by due process of law," which all commentators and all lawyers agree, means proceedings according to the course of the common law.

I am aware that this will seem strange to some people who think that as we are at war with the rebels, we ought of course to be able to enact any law we pleased, inflicting upon them punishment befitting their crimes. Such people, however, will do well to remember that our Government is not one of absolute powers—it is in no respect omnipotent or restrained only by its own sense of propriety or policy. On the contrary, its powers are limited to those expressly delegated to it, and are not to be implied from any supposed necessity that they ought to have been conferred, or that it was intended to confer them. Besides this, the powers actually delegated are also distributed and divided to and among the several departments of the Government which are to exercise them. These, too, must confine themselves severally to their functions as fixed by the terms of the grant. Congress has its part, the President has his part, and the courts their part. Now Congress, for instance, has no power to punish anybody, (except for contempts,) and to-day, if we had half a dozen of the worst rebels caged here in this Chamber, we could inflict upon them no punishment. We could not order the Sergeant-at-Arms to hang or behead them, no matter how certain we might be of their guilt. Nay, more; the President himself and all his army could not lead them away from this Hall to execution. The only way they could be punished at all, would be to deliver them over to the judges—the proper judges—because no one judge might have a right to try all of them. Nay, it is possible every one of them might have to be tried by his separate judge, in his separate court and district. There, again, the functions of the judges, in such cases, are limited—a jury shares them, and its members are the exclusive judges of the facts, while, after the condemnation and judgment, the sheriff or marshal would be the only person having the right to execute the judgment.

I may also further remark that it is in this limitation of the powers of the Government, and their distribution after the manner of the Constitution, that its great merit consists. On those accounts we love, cherish, and revere it; and because it has such features we are now at war with all our force and treasure to defend and preserve it. Had we no Constitution limiting its powers, defining its agencies, fixing the boundaries of their rights and duties under it, nobody would lift a hand for it; and if you make it usurp powers not granted at all, not granted to the usurping department, then our war for it is a great mistake, if not a great wickedness.

Again: this is further guarded against in the ninth section of the first article and third clause, as follows:

"No bill of attainder or *ex post facto* law shall be passed."

A bill of attainder was a mode of proceeding resorted to in England, as well as in some of the United States during the Revolution, to

condemn and punish traitors, by Parliament or the Legislature, in cases where they were out of the reach of the process of the courts; nay, indeed, in many cases even after they were dead. In such cases the law-making branch of the Government supplied the want of due process of law by blending together in one statute the law and the application of the law to particular persons named therein, or to a class of persons by description. Bills of attainder condemned the accused to death, (if not dead already,) forfeited their estates, and corrupted the inheritable blood of their children and heirs, so that no one could take any estate either from or through them. Bills, however, like the one under consideration, which does not propose to inflict capital punishment, or corrupt the blood of the offenders, but imposed other penalties of lesser grade, were called "Bills of pains and penalties."

It may be said the latter are not within the prohibition, and therefore allowable here. It is true they are not within the letter of it, but being equally within the mischief, which was, that the legislature should in any case attempt to usurp and exercise the functions of the courts; and construing the fifth amendment in connection, I have no doubt they are also prohibited. Indeed, no one can come to any other conclusion but that the convention which framed the Constitution intended to remove every possibility of the usurpation, by Congress, of the power to punish anybody without "due process of law."

Besides, to grant our power of passing bills of pains and penalties is to nullify the whole effect of the clause, inasmuch as it is easy, by passing several of these against the same person, to make their aggregate result precisely the same as a bill of attainder. Such a construction would defeat the provision instead of making it avail, as intended.

We are not left, however, without authority as to this point, if any were needed to give force to the reason adduced for it, because Judge Story, in his Commentary on the Constitution, at section 1,344, says:

"But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties; for the Supreme Court has said, 'A bill of attainder may effect the life of an individual, or may confiscate his property, or both.'"

And for this he cites Fletcher *vs.* Peck, 6 Cranch's Reports, 138; 1 Kent's Commentaries, sec. 19, p. 382; and this was well shown by the honorable Senator from California.

This, then, being, in the language of the Supreme Court, a bill of attainder, and in the stricter language of the common law a bill of pains and penalties, is clearly within the prohibition contained in the clause read; and nothing which I can say is so apposite as the remainder of the section quoted from Judge Story, and from it all may see the view taken of such laws as this by a jurist so eminent—one, too, sitting calmly in his closet and free from all those exciting influences which, in troubled times like ours, are so apt to warp our judgments and blind our reason to the truth:

"Bills of attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But, in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties, for the Supreme Court have said, 'a bill of attainder may affect the life of an individual, or may confiscate his property, or both.' In such cases, the Legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. Such acts have been often resorted to in foreign Governments as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching as well to the absent and the dead as to the living. Sir Edward Coke has mentioned it to be among the transcendent powers of Parliament, that an act may be passed to attaint a man after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of Parliament, a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor. The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof, and sometimes because the law, in its

ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free Government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused, to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed, in England, in times of rebellion, or of gross subserviency to the Crown, or of violent political excitements—periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."

I have thus far considered the subject of forfeiture of estates as a punishment for crime, and I think no one can doubt that it is unconstitutional, if absolute, even in the ordinary course of the administration of the laws; and I think it is also equally clear that no warrant can be found for it, where the legislature undertakes to declare it upon the principle of a bill of attainder.

I now propose to go further, and argue that the exercise of such a power, even if it had been granted, would now be mischievous and impolitic, and that our fathers did wisely and well in refusing it. Their great principle was to punish the guilty alone, and not involve a whole family in the ruin which the head of it might have brought upon himself by his crimes, because, in fact, the family might have been, and in most cases was, wholly innocent. By their just leniency they showed that they looked beyond the hour of conflict to the better day of reconciliation, and offered a bounty to the heirs of the guilty that they might be loyal. I may say, too, that the civilized world, at least in all Christendom, have come to this same conclusion, and have generally purged their statute-books of such a relic of angry barbarism:

"The reason commonly assigned for these severe punishments, beyond the mere forfeiture of the life of the party attainted, are these: by committing treason the party has broken his original bond of allegiance, and forfeited his social rights. Among these social rights, that of transmitting property to others is deemed one of the chief and most valuable. Moreover, such forfeitures, whereby the posterity of the offender must suffer, as well as himself, will help to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has to keep from offending. But this view of the subject is wholly unsatisfactory. It looks only to the offender himself, and is regardless of his innocent posterity. It really operates as a posthumous punishment upon them, and compels them to bear, not only the disgrace naturally attendant upon such flagitious crimes, but takes from them the common rights and privileges enjoyed by all other citizens, where they are wholly innocent, and however remote they may be in the lineage from the first offender. It surely is enough for society to take the life of the offender, as a just punishment of his crime, without taking from his offspring and relatives that property which may be the only means of saving them from poverty and ruin. It is bad policy, too; for it cuts off all the attachments which these unfortunate victims might otherwise feel for their own government, and prepares them to engage in any other service, by which their supposed injuries may be redressed, or their hereditary hatred gratified. Upon these and similar grounds it may be presumed that the clause was first introduced into the original draft of the Constitution, and after some amendments it was adopted without any apparent resistance. By the laws since passed by Congress, it is declared that no conviction or judgment, for any capital or other offences, shall work corruption of blood, or any forfeiture of estate. The history of other countries abundantly proves that one of the strong incentives to prosecute offences as treason has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge, of gratifying its envy of the rich and good, and of increasing its means to reward favorites, and secure retainers for the worst deeds."—*Story's Commentaries on the Constitution*, sec. 1,300.

In the light of this exposition let us follow the consequences of this bill into detail, and let us suppose its provisions fully carried out. Our armies have overrun the whole territories of the Confederate States; resistance has entirely ceased; and the President and his officers being masters of the country, they have time to finish the residue of their work, by gathering in the balance of the property of the rebels not already taken to supply the "military necessities" of the suppression. The rebels themselves are homeless, houseless, and propertyless; and the question arises, have you made them loyal by your severity? Are you assured their love for the Union will return again after this chastisement? Have you thought how they would shout at the sight of the glorious old banner—"the Stars and Stripes"—which brought them such deliverance?

Mr. President, these people are to be again our brethren and kinsman, if such a thing is possible; but it does seem to me that, by such laws as this, you will make that possibility a very remote one. Will not their women and children hate you, and their children's children hate and curse you down to the latest generation; and whenever they get a chance will they not rebel against you? Have you not sown the seeds of many rebellions by this one ill-advised act? All this might make little or no difference, if they were of hostile race and alien enemies, and if we were making war upon them for conquest and subjugation. But that is not the fact. We have here in these Halls of Congress solemnly declared that the war was for no such purpose, but that it was for the purpose of compelling obedience to the Constitution and the laws; and I am for standing upon that declaration.

The Constitution and the laws being restored and obedience tendered, is this law one of them? Now, we suppose that a large number of people everywhere in the Confederate States were constrained, even by force, to join in the rebellion—are these to suffer upon the same scaffolds with the willing traitor; and is there no difference to be made between the general who betrayed his country and the soldier he has compelled to march at his bidding at the head of a rebel column? This bill makes none; and if it did, it makes no provision to try it and determine its value when it is found; the officers have seized the property, and the victim of force in the beginning ends by being the victim of wrong and injustice. To him the Constitution and laws are not yet restored. Again: thousands of these people have been duped into rebellion by being told that we of the North were all abolitionists—intent, when we had the power, to wield it for the emancipation of their slaves, and the destruction of their social system. What does your bill do with these—these men, who believed the falsehood because it was first asserted by Southern demagogues, and then proved and corroborated by Northern knaves? Is there no difference here, again, between the wily traitor and his simple dupe? This bill makes none, but includes within its terms the whole rebel population, of every State and degree, from the lordly planter down to the negro laborer; and the broad acres of the one, as well as the narrow hovel of the other, are alike forfeit under it.

But the President and his officers are to dispose of these confiscated estates. Who will buy them? What kind of neighborhood will exist between the former owner or his heirs and your alienees or their heirs? How the delights of this society will enhance the value of those estates to the purchasers, especially when they reflect that the forfeiture will never be forgotten in the family of the rebel, and that if they have no other, they can transmit this inheritance to their descendants unimpaired for centuries! The tradition of it will sit continually by the hearthstone of that family a hideous spectre, deathless for ages, prompting to revenge and inciting to rebellion. Sir, your thrifty purchasers will not like incumbrances such as these hanging over your forfeited estates; and you might as well try to attract them and their capital to your vendue, by promising they should be entitled, as appurtenant to the land offered for sale, to an Irish feud in perpetuity, or a Corsican vendetta in fee to them and their heirs forever. Such titles have never been desirable. In the French revolution, even when its success seemed well assured, the holders of the assignats refused to buy the public domain with them, although, at that time (August, 1793) the franc assignat had so depreciated that the metal franc was worth nine of them. Sir, you might as well expect capital to seek the margin of an extinct volcano, before the lava had cooled, for investments in real estate. The only purpose forfeitures ever served in ancient times was to furnish a means of payment to the hardy soldier who achieved their conquest; his title was his sword, and he could maintain it. That which is taken in war must be kept in war. Every hill must have its castle, and every march its wardens. But surely this is not one of the "dispositions" the President and his officers are to make of this property.

I desire here, sir, to notice, in regard to this second section, that it is liable to another objection which, to my mind, is fatal in itself upon grounds of policy:

SEC. 2. *And be it further enacted*, That every person having claim to the service or labor of any other person in any State under the laws thereof, who during the present rebellion shall take up arms against the United States, or in any manner give aid and comfort to said rebellion, shall thereby forthwith forfeit all claim to

such service or labor, and the persons from whom it is claimed to be due, commonly called slaves, shall, *ipso facto*, on the commission of the act of forfeiture by the party having claim to the service or labor as aforesaid, be discharged therefrom, and become forever thereafter free persons, any law of any State or of the United States to the contrary notwithstanding. And whenever any person claiming to be entitled to the service or labor of any other person declared to be discharged from such labor or service under the provisions of this act shall seek to enforce such claim, he shall, in the first instance and before any order for the surrender of the person whose service is claimed, establish not only his title to such service, as now provided by law, but also that he is and has been, during the existing rebellion, loyal to the Government of the United States; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or to surrender up any such person to the claimant."

Now, sir, as a Republican, I protest against any measure of this kind emanating from the legislative branch of this Government. I do so for my own, and for the sake of the great party which came to the rescue of the Union and the Government just at the time when the conspirators had almost consummated the ruin of both, and both of which, I trust in God, with the aid of good loyal men everywhere, it will be strong enough to restore and wise enough to preserve in all their former vigor and glory. Now, sir, if ever there was one slander more foul than another, or more mischievous to the peace and happiness of the country than another, it was the allegation made by the conspirators of the South, and reiterated over and over again by their scarcely less wicked confederates of the North, that the sole object of the Republican party was the abolition of negro slavery in the Southern States of the Union. That SLANDER, sir, was the moving cause of this war; that was the catchword which inflamed the South, which enabled the leaders of the rebellion to consolidate her people and obtain over them a control which prevented us ever since 1854 from having a hearing before them, which shut out from them all testimony as to our real principles and beliefs, and left them exposed to be confirmed in their error by the knowing and wilful falsehood of their allies in the North. And, sir, I have but a single word here to say of those allies, and it is this: that I have a thousand times more respect for and faith in the poor soldier in the rebel army today, and in his patriotism and loyalty, than I have in those editors of the North who, year after year, month after month, and day after day—knowing the same to be false—published and sent down to the South this gigantic lie and base slander against the true men of the free States, nine hundred and ninety-nine out of every thousand of whom never dreamed of disturbing anybody's constitutional rights, never thought of abolishing negro slavery when it lawfully existed in States; men who, on the contrary, were as obedient to the Constitution as to the behests of their religion, reverencing it next to their Bibles, and giving now on the battle-fields of the South the offer of their very lives to sustain it; men who never cared or took a thought of slavery as imposing a single responsibility upon them, and who never would have come into collision with it anywhere of their own choice. But when it insolently attempted outside of its legitimate sphere and within their lawful reach to provoke a struggle and contest with them as to whether the common Territories of the nation should be the homes of free white men or of servile negroes, they resisted it, as they had a right to do. It was a simple question between the white men and the negroes—which should have the Territories; if the negro succeeded, the white man *would not* inhabit them in his company; and if the white succeeded, the negro *should not*.

The victory was won by the white man; and the creed and doctrine which animated him in achieving it is "Republicanism." Nothing more—nothing less. So it was declared and published everywhere; so it is understood by the people; so elevated into power by the nation; so put forth almost unanimously by the present Congress. We have said we had no right, and we claimed none, to meddle with slaves or slavery in the slave States. All which has been and is now perfectly understood by all not wilfully blind.

Then, sir, I say again, that as a Republican, standing upon the Constitution as construed by that party, I protest against the second section of this bill as being a total and entire departure from the principles of that instrument, most mischievous at this time, because it uselessly distracts, divides, and weakens the friends of the country when they ought to be united and

of one accord in action, if ever such were needed before. In addition to this, it would make us do of all things in the world that which would most gratify and strengthen our enemies everywhere—worth to-day more than a hundred thousand armed men to the traitors of the South, and worth more than five hundred thousand votes to the would-be traitors of the North; thus enabling the latter again to get control of the Government, to wield it as they have wielded it before. No, sir; pass that bill by this Congress, and every falsehood uttered and every design charged upon us in six years of desperate struggle is verified by our deliberate act—an act as useless to the country and to the cause in which we are engaged (apart from other objections) as would be a law against serfdom in Russia passed here.

I know that a great many good people, who hate slavery, and ardently desire that the country were well rid of it, will at first be inclined to wonder at the difficulties in the way of their favorite schemes; but I have no doubt, on further reflection, they too will recognise them. I know that many people suppose, in some way not very clear to them, that our powers under the Constitution have been indefinitely enlarged by the fact that a civil war is now raging in one-half the States of the Union, calling into play what is called the "war power" of Congress, by virtue of which we can pass any law we choose which tends, or is supposed to tend, towards the suppression of the rebellion, and that under it this bill is warranted by the Constitution.

I think all this will be found a delusion and a snare. Our power to-day is no greater than it was at any time since the formation of the Constitution, and any law enacted now which would have been unconstitutional if enacted then, would be unconstitutional now. Nobody pretends that if Jefferson Davis alone had been guilty of treason last year or the year before, and had escaped the jurisdiction of the courts, that Congress could have attainted him as a traitor, or forfeited his property, or emancipated his slaves. Even the simplest man would have known that in such case he must be tried, convicted, and punished by law. Nor can the case be at all altered if one thousand or one hundred thousand other traitors were in the same category, because neither the power of the legislature or courts is enlarged in the slightest degree by the multiplication of the number of the criminals. The grants of power to us in the Constitution were fixed in it from the beginning, and we stand just where we did always.

But cases may arise where the laws are inadequate to the preservation of the order and peace of society; not because they are not severe enough, but because they cannot be executed. That is the case now in eleven States of the Union, and the question is, what is the remedy? Since the laws are silent, the courts destroyed, and the will of the nation disregarded, how does the Constitution meet the emergency? Does it meet it, and effectually? I answer unhesitatingly it does, and as promptly as any other system of government in the world; and since the law is of no avail it resorts to force, military force—in other words, war; and those who resist are treated by this method the same as though they were alien enemies. I may say that this course is adopted because of its superior efficacy over law, and the law abdicates to make way for war.

Then, who shall make this war and determine how it shall be carried on? Shall it be Congress, the President, or the judges? Some think the power is in Congress, because the Constitution confers upon that branch the power to declare war; but the power to declare war is not the power to make war, but simply the right to declare when the necessity for war had come. And it might just as well have been left to the Supreme Court to decide that question; and if it had, surely nobody would have contended that that court would have been the war-making power.

The Constitution declares that the President shall be the Commander-in-Chief of the army and navy, or, in other words, the force of the nation is put into his hands, investing him with the war-making power; and he must wield it until all resistance has ceased or till peace is made. He is the commander directing and controlling it as he pleases, and only restrained in so far by Congress in that he must depend upon them to foot his bills and authorize his levies. He organizes the forces, appoints the officers, directs their operations, and is responsible for the failure or success of the campaigns; and it makes no difference whether the enemies who resist him are alien enemies or disaffected citizens in revolt, he conducts the war upon

the same principles in both cases. Indeed, these principles are now so well settled and agreed upon by the civilized nations of the world, that they have become part of a great general code called the "Laws of Nations," and which are obligatory upon all belligerents everywhere. In the conduct of the civil war now waging in this country, the President is guided and controlled by these laws, nor has the Congress any power whatever to alter or change them, and bind him by so doing against his consent:

"A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the State and resisting the lawful authority, they are not the less divided in fact. Besides, who shall judge them? Who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations, who engage in a contest, and being unable to come to an agreement have recourse to arms. This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor, which we have already detailed in the course of this work, ought to be observed by both parties in every civil war. For the same reasons which render the observance of those maxims a matter of obligation between State and State, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals. If he does not religiously observe the capitulations, and all other conventions made with his enemies, they will no longer rely on his word. Should he burn and ravage, they will follow his example. The war will become cruel, horrible, and every day more destructive to the nation. The Duke de Montpensier's infamous and barbarous excesses against the reformed party in France are too well known. The men were delivered up to the executioner, and the women to the brutality of the soldiers. What was the consequence? The Protestants became exasperated; they took vengeance of such inhuman practices; and the war, before sufficiently cruel as a civil and religious war, became more bloody and destructive. Who could without horror read of the savage cruelties committed by the Baron Des Adrets? By turns a Catholic and a Protestant, he distinguished himself by his barbarity on both sides. At length it became necessary to relinquish those pretensions to judicial authority over men who proved themselves capable of supporting their cause by force of arms, and to treat them, not as criminals, but as enemies. Even the troops have often refused to serve in a war wherein the prince exposed them to cruel reprisals. Officers who had the highest sense of honor, though ready to shed their blood in the field of battle for his service, have not thought it any part of their duty to run the hazard of an ignominious death. Whenever, therefore, a numerous body of men think they have a right to resist the sovereign, and feel themselves in a condition to appeal to the sword, the war ought to be carried on by the contending parties in the same manner as by two different nations; and they ought to leave open the same means for preventing its being carried to outrageous extremities, and for the restoration of peace.

"When the sovereign has subdued the opposite party, and reduced them to submit and sue for peace, he may except from the amnesty the authors of the disturbances—the heads of the party. He may bring them to a legal trial, and punish them if they be found guilty. He may act in this manner particularly on occasion of those disturbances in which the interests of the people are not so much the object in view as the private aims of some powerful individuals, and which rather deserves the appellation of *revolt* than of *civil war*. Such was the case of the unfortunate Duke of Montmorency. He took up arms against the King in support of the Duke of Orleans; and, being defeated and taken prisoner at the battle of Castelnaudari, he lost his life on a scaffold, by the sentence of the Parliament of Toulouse. If he was generally pitied by all men of worth and sentiment, it was because they viewed him rather as an opponent to the exorbitant power of an imperious minister than as a rebel against his sovereign, and that his heroic virtues seemed to warrant the purity of his intentions."—*Vattel's Law of Nations*, book 3, chap. 18, secs. 293, 294.

In fact, from the very nature of these laws, it is almost utterly impossible that they could be made into enactments by any legislative body; and this for the reason that they consist of a great number of alternative rules, each depending upon circumstances as to whether it shall be observed or not; the whole being embraced and included by the great law of self-defence, establishing the right to do anything that is necessary to secure it, even to killing our enemies, and doing them all the harm possible.

In judging as to what is necessary, the general has not absolute, but legal discretion in

the premises—that is, within the law; as for instance, he may judge it necessary to kill his prisoners of war, but only by way of retaliation, when his enemy has first killed such prisoners as he may have taken—and this to stop the practice, not to introduce it. Hence, it may be said that no legislature could enact laws of war, because it is impossible to foresee the contingencies upon which their application may depend. And again, such enactments would be wholly useless, because if they were different from those agreed upon by the nations, these would resist them and restore the old; if, on the other hand, no alteration was made, nothing would be gained.

And in the case before us, the President, or his generals, with their armies, have a right to attack the rebels in arms, and kill them if they do not submit. He has also a right to take, by way of capture, all their public property used in the war, such as forts, ships, arms, ammunition, stores of every kind, &c., but he could not do as this bill proposes to do; he could not follow the rebel after his surrender, and take from his house the private property which he had left there for his wife and children, while he was at the war. And all this because a Christian civilization has taught the nations that such modes of making war are not only not necessary, but that they are in all cases mischievous and injurious, even to the conqueror himself. The modern rule is very clearly stated by Wheaton, in his "Elements of International Law," at page 419, *et seq.*, of the sixth edition, as follows:

"The application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy. From the moment one State is at war with another, it has, on general principles, a right to seize all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use, or to that of the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the fourth oration against Verres, where he says that 'victory made all the *sacred* things of the Syracusians *profane*.' But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices, devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the movable and immovable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity; and such was the fate of the Roman provinces, subdued by the northern barbarians, on the decline and fall of the western empire. A large portion, from one-third to two-thirds, of the lands belonging to the vanquished provincials was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the Government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign, in respect to the eminent domain. In other respects, private rights are unaffected by conquest."

It may be proper here to say a few words in regard to the slave property of the rebels engaged in this war—with regard to this species of property the laws of war are silent, inasmuch as from the necessity of the case it could have no means of distinguishing the slaves of a hostile people from the people themselves. In our own case, although our generals might well know a negro from a white man, yet, as all negroes are not necessarily slaves, they could not determine the question as to which class any they met might belong. It is their duty, then, to take things as they find them, and consider the negroes simply as persons. Then, if they are hostile they are to be treated as enemies, or if they are friendly they should be treated as friends precisely as though they were not marked by any difference of complexion.

The next question which arises is, whether, being friends, we should enroll them as soldiers in our armies? The answer to this depends upon another consideration. We have seen that the President must make war according to the laws of nations, and, of course, he must compel his soldiers to observe those laws; and he would not be warranted in enlisting such as could not, from any cause, be so con-

trolled and restrained. In this way England violated the laws of war by employing the Indians against us in the Revolution, and everybody remembers the terrible denunciations of Lord Chatham against it. The Indians were savages who murdered women and children, and burned their prisoners at the stake—with other practices equally abhorrent to humanity—and nobody could be justified in making soldiers of them.

It follows, then, as a corollary from this, that if the negroes of the South could be drilled and disciplined so as to become obedient to the laws of war, there is no valid objection to their being employed for that purpose the same as other men. But if, on the other hand, they are ignorant, barbarous, and savage to such an extent as coupled with the fact that they belong to a race towards which ours entertains strong antipathies, and from their degraded and servile condition it would be impossible to restrain them from committing outrages not allowable even against the enemy, then they ought not to be employed in our ranks; and to do so on our part would bring down upon us the odium of all Christendom, and the condemnation of all good men.

This question, then, is one for the President and his military advisers to decide; and I am content to confide it to them, as I am all other duties devolved upon them by the laws and the Constitution.

But it is said that because the Constitution confers upon Congress the right "to make rules concerning captures on land and water," that this law is proper to enable the President to make the captures it contemplates. The answer is that the bill does not contemplate, apply, or relate to captures at all; because in the case of a capture the right to the thing captured depends solely upon the taking, and in case of recapture by the first owner his right reverts again—but this is a bill of forfeiture and confiscation, or perhaps a confused attempt at both, and if it could operate at all it would pass the title of all the property of rebels immediately to and vest it in the United States without any capture or seizure of it whatever, the law itself conferring seizin upon the United States by the very terms of it.

Again: It is attempted to put the propriety of this bill, and I suppose the constitutionality of it too, upon the principle ruled in the case of the United States *vs.* Brown, 8 Cranch, 110, in which it was held that enemy property in this country at the declaration of the war against Great Britain, in 1812, was not confiscated by the fact of that declaration, and that in order to do so an act of Congress was necessary—and so I think the law is—for the reason that in that case the property attempted to be confiscated was within the domain of *law*, and the *law*—I mean, here, municipal law—is, of course, supreme everywhere within its domain; but the property which this bill attempts to confiscate by its first section is in the country of the belligerent, and therefore extra-territorial, where the law can have no effect, and where we are obliged to operate by force or war. The Legislature, therefore, has nothing to do with it till the President captures it, (as he might in certain cases be warranted in doing,) and then Congress might make a law for its disposition, either giving it in whole or in part to the captors, or directing the whole to be put into the public Treasury.

But I suppose it will be said that all the property to be confiscated by this bill is now in this country, and therefore within the principle of the case of Brown; if so, then I say the rebels are not belligerents; and if they are not belligerents, then we have no right to confiscate their property any more than we have a right to forfeit it for crime. Either form of the dilemma is fatal to the bill; nevertheless, it is entitled to its choice of them.

This kind of vicious reasoning in a circle pervades the whole character of the bill, since it is perfectly clear that it can only justify its claim to confiscate on the grounds that the rebels are belligerents and enemies outside the purview of the Constitution; while, on the other hand, it claims jurisdiction of them and their property as though they were citizens, and within the Constitution. In this way the constitutional guarantees, to which I have referred, would all be nullified, and neither rebel nor traitor would be recognised in the instrument. We might then forfeit all their property upon a judgment against them as belligerents, and afterwards hang them on the ground of their treason. I submit, Mr. President, the proposition is absurd and suicidal, carrying its own refutation on the face of it.

Sir, I hope and trust some other and better way than this will be found to punish those

concerned in this rebellion after it shall have been suppressed, and that the method adopted, whatever it may be, will not be one which will furnish cause for future revolts. Those who are to be punished at all, ought to be punished effectually under the Constitution, and according to the laws they have violated; and those who are to be forgiven ought to be forgiven fully and freely as it becomes the majesty of a great nation to forgive. Having rescued the revolted States, and restored the dominion over them to the loyal people within them, I would have the traitors dealt with in such way as not to endanger in the future either the happiness or safety of such as have remained faithful through the terrible ordeal to which they been subjected. In this I should consult their wishes and defer much to their better judgment; but certainly I would not do that which, in their opinion, would leave them worse with the Union restored than they would be with the Confederacy sustained. I would not offer bounties to make them rebels, neither would I impose penalties or conditions having the like effect. I look upon this bill as a measure of the latter kind—the natural consequence of which would be to give to the rebels the energy of despair, and to take from the loyalists every motive for fidelity. Pass this bill, and the same messenger who carries it to the South will come back to us with the news of their complete consolidation as one man. We will then have done that which treason could not do; we, ourselves, will then have dissolved the Union; we shall have rent its sacred charter and extinguished the last vestige of affection for it in the slave States by our blind and passionate folly.

I am well aware, sir, of the object of this second clause—emancipating the slaves of the rebels—and I know there are many who think that ought to be done, because they think slavery the only cause for the rebellion. In considering this, it is well to remember that there are now in the world, and always will be, many great evils which God, in His wisdom, and for His own purposes, has put out of the reach of remedy, except in His own way and at His own time, and then His means are always adequate and very generally apparent. Four millions of negro slaves are now in bondage in the United States. Where are the signs of their emancipation? Have not hundreds of thousands of them everywhere had ample opportunities to throw off their chains within the last few months? Have they done so? And if they have not done so, can you compel them to exchange voluntary servitude for involuntary freedom? I thought the world was old enough by this time to know that they who are entitled to freedom themselves must strike the blow which is to secure it. What blow has the negro struck for himself in this his fairest opportunity? His rebel master, with a madness to all other men incomprehensible, engaged himself in revolt, broke up the society in which he lived, liberated all its elements, so that they are free to act, and thus tacitly invited him to assert his manhood? How has he availed himself of it? Why, sir, just in the way one might have expected; knowing nothing of liberty, caring nothing for it, he has remained inactive as the domestic animals around him, impelled, perhaps, by the same unconscious instinct of dependence upon the providence of a master wiser and stronger than himself. A child always in the scale of development, he may have had some child's consciousness that the boon of liberty so ostentatiously offered him by his over zealous friends might prove to him fatal as the shirt of Nessus or the box of Pandora, and he still hesitates and hugs his chains. I have no hope of him yet, though, God knows, I would have him free, free as I am myself, if freedom be his choice, through the strife and agony by which he, as all men, must purchase it. Eternal vigilance and continual struggle is the price of liberty.

In conclusion, I have only to say that I hope this bill will not pass, and that we may all address ourselves to the matters we have in hand, that are really necessary to our success in the great struggle in which we are engaged.

Surely there is no call for us that we should turn out of our safe way to tread upon dubious ground. Surely we have enemies enough already, without making more by embarking in new projects so objectionable to the friends we now need so much. Can we not await a little longer the tide of events before we engage in doing that which, even if there were nothing else against it, all must agree is now premature? Is not our first duty to carry on the great war we have undertaken, till we have triumphantly secured the great end for which we wage it, without anticipating that triumph, and perhaps

losing it by yielding ourselves to the premature anticipation?

For my own part, I can only see my duty clearly by confining my vision to the sole end of restoring the supremacy of the Constitution and laws over the whole territory of the Union, and then all else is easy. May God grant this consummation!

Edgar Cowan
U.S.